Supreme Court, U. S.
FILED
JUL 2 1980
MICHAEL RODAK, JR., CLERK

No. 80-5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RICHARD JOHN McCARTY, APPELLANT

v.

PATRICIA ANN McCARTY, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

JURISDICTIONAL STATEMENT

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June 30, 1980

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

RICHARD JOHN McCARTY, Appellant

v.

PATRICIA ANN McCARTY, Appellee

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

JURISDICTIONAL STATEMENT

Appellant Richard John McCarty appeals from the final judgment of the Court of Appeal of California, First Appellate District, Division Four, following the California Supreme Court's denial of his petition for hearing.

QUESTION PRESENTED

Whether the system of military retirement benefits established by the Congress, preempt the State of California from treating army retirement pay as community property divisible upon divorce.

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OPINIONS BELOW

The Court of Appeal's opinion is unreported. (App. A, infra.) The San Francisco superior court's memorandum of intended decision is also unreported. (App. B, infra.) The California Supreme Court rendered no opinion when it denied Appellant's Petition for hearing. (See App. C, infra.)

JURISDICTION

The California Court of Appeal entered its judgment on February 6, 1980. The Supreme Court of California denied Appellant's petition for hearing on April 3, 1980. A notice of appeal to this Court was duly filed in the California Court of Appeal on June 30, 1980.

This appeal is being docketed within 90 days of the California Supreme Court's denial of Appellant's petition for hearing.

Appellant argued below that § 4803 of the California Civil Code, as applied to army retirement pay, was repugnant to federal statutes and invalid under the U.S. Constitution. The California courts upheld the statute's validity.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2). Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes:

10 U.S.C. §§ 672(a)(1) 3929, 3991
11 U.S.C. § 523(a)(5)
42 U.S.C. §§ 659(a), 662(c)
California Civil Code § 4803

These statutes, along with Article VI, clause 2 of the United States Constitution, appear in Appendix E.

STATEMENT OF THE CASE

The parties were married on March 23, 1957. Appellant ("the husband") commenced active duty in the U. S. Army on July 1, 1958. On December 1, 1976, he filed for divorce in the San Francisco superior court. Appellant retired from the army on September 30, 1978, after twenty years of active duty. The parties were divorced by interlocutory judgment entered on September 8, 1977. The superior court entered final judgment of divorce on February 23, 1978.

In the superior court, Appellee ("the wife") claimed that under § 4803 of the California Civil Code, Appellant's army retirement pay was "quasi-community property" divisible upon divorce. The husband argued inter alia[1/] that applying § 4803 to his retirement pay would contravene federal statutes and violate the supremacy clause of the U. S. Constitution.[2/]

1/ The husband also argued before all three California courts that he was an Oregon domiciliary when he commenced active duty; that during his uninterrupted military service he had not lost his Oregon domicile; and that California could not apply its quasi-community property law to a non-California domiciliary. The issue of domicile was resolved against the husband. No appeal is taken from that part of the judgment below.

2/ The husband timely raised these contentions before the trial judge both by memorandum and in oral argument.

There is no transcript of the oral proceedings before the superior court. The court reporter became seriously ill before she could prepare one.

Rejecting this argument, the superior court awarded the wife approximately half of the husband's retirement pay.[3/]

In the Court of Appeal, the husband again maintained that federal statutes, taken together with the supremacy clause of the federal Constitution, preempted California from dividing retirement pay upon divorce.[4/] Citing Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), he argued that applying

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[3/] The superior court ordered the husband to pay the wife "as long as she lives, that portion of his total monthly pension or retirement payment from the U. S. Army which equals one-half of the ratio of the total time between marriage and separation during which petitioner was in the U. S. Army for the total number of years he has served with the army at the time of retirement". Interlocutory Judgment, para. 6, App. B, Doc. 3.

[4/] The husband raised the federal question in his opening brief, in his reply brief, and in a supplemental brief.

the quasi-community property scheme of California, Civil Code § 4803, to army retirement pay would impermissibly interfere with the military retirement system established by the Congress. Dividing army retirement pay would also, the husband asserted, contravene recent amendments to the Social Security Act, Pub. L. No. 93-647, 88 Stat. 2357 (1975) (codified at 42 U.S.C. § 659(a)) and Pub. L. No. 95-30, 91 Stat. 159 (1977) (codified at 42 U.S.C. § 662(c)). Although Hisquierdo related to the retirement formula established under the Railroad Retirement Act, 45 U.S.C. § 231 et seq., its reasoning and the authorities on which it relied applied, in Appellant's view, with equal force to military retirement pay.

The Court of Appeal concluded that Congress had not intended to exempt army retirement pay from state community property laws, and that Appellant's retirement pay

was subject to division upon divorce. Citing Gorman v. Gorman, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479 (4th Dist. 1979), the court limited Hisquierdo to railroad retirement benefits.[5/] (App. A, at 57-59.)

The husband petitioned for a hearing in the Supreme Court of California, reiterating his previous arguments and pointing out that the Court of Appeal's decision in the case at bar conflicted with Milhan v.Milhan, 97 Cal. App. 3d 55, 158 Cal. Rptr. 523 (2d Dist. 1979), petition for hearing granted (Cal., Nov. 15, 1978) (L.A. 31191). In Milhan another division of the Court of Appeal had construed Hisquierdo as mandating the same treatment for military retirement pay as for

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[5/] Although Appellant emphasized the central importance of Hisquierdo and the federal preemption issue, the Court of Appeal devoted the bulk of its opinion to procedural issues and the question of domicile. See App. A.

railroad retirement benefits--and as prohibiting California from dividing those benefits upon divorce. Although the California Supreme Court granted a petition for hearing in Milhan, it denied the husband's petition for hearing.[6/]

[6/] The California Supreme Court heard oral arguments in the Milhan case on June 9, 1980.

That court's last word on Hisquierdo's applicability to military retirement benefits appears in a footnote to Henn v. Henn, 26 Cal. 3d 323, 328, 605 P.2d 10, 12, 161 Cal. Rptr. 502, 504, n.3 (decided Jan. 29, 1980). The full text of that footnote reads as follows:

> "The recent decision of the United States Supreme Court in Hisquierdo v. Hisquierdo (1979) 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 does not compel reconsideration of our holding in Fithian, supra, certiorari denied 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d 48. In Hisquierdo, the Supreme Court held that federal benefits available under the Railroad Retirement Act of 1974 may not be divided as community property by state courts. However, Hisquierdo was explicitly grounded on 'the totality of the statutory scheme for railroad retirement benefits including its special tax funding, and its unique provisions and legislative history indicating that upon dissolution of marriage the nonemployee spouse should receive no part of the employee spouse's benefits.' (Gorman v. Gorman (1979) 90 Cal. App. 3d 454, 462, 153 Cal. Rptr. 479, 483.)"

THE QUESTION IS SUBSTANTIAL

The question warrants plenary consideration for four reasons:

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SUPREME COURTS OF ALASKA AND TEXAS, AS WELL AS WITH DECISIONS OF OTHER STATE COURTS.

Following this Court's decision in Hisquierdo, the Supreme Court of Alaska held that the supremacy clause of the U. S. Constitution prohibits the states from dividing military retirement benefits upon divorce. Cose v. Cose, 592 P.2d 1230, 1232 (Alaska 1979), cert. petition docketed, 48 U.S.L.W. 3627 (U.S. March 19, 1980) (No. 79-1469). Similarly, the Texas Supreme Court held in Ex parte Johnson, 591 S.W. 2d 453 (Texas 1979), that under Hisquierdo, veterans benefits are not subject to division upon divorce.

The highest of courts of other states, however, have read Hisquierdo as allowing the division of military retirement pay pursuant to a divorce:

- Montana: Miller v. Miller, ___ Mont. ___, 609 P.2d 1185 (1980).
- Arizona: Czarnecki v. Czarnecki, 123 Ariz. 466, 600 P.2d 1098 (1979).
- California: Henn v. Henn, 26 Cal. 3d 323, 328, 161 Cal. Rptr. 502, 504, 605 P.2d 10, 12 n.3 (1980) (dictum in footnote).

State appellate courts are split on whether Hisquierdo applies to military re-

tirement pay.[7] This clash of authorities perpetuates the uncertainties which existed prior to Hisquierdo--uncertainties created by the state courts' inconsistent decisions on the divisibility of military retirement pay.[8]

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[7] Compare Milhan v. Milhan, 97 Cal. App. 3d 55, 158 Cal. Rptr. 523 (2d Dist. 1979) (Hisquierdo requires that military retirement benefits be treated as serviceman-husband's separate property, not subject to division upon divorce), petition for hearing granted (Cal., Nov. 15, 1979) (No 2 Civ. 55276), and Perez v. Perez, 587 S.W. 2d 671 (Texas 1979) (treating military readjustment benefits as separate property in order to comport with the objectives of Congress), with Musser v. Musser, 70 Ill. App. 3d 706, 388 N.E. 2d 1289 (4th Dist. 1979), and Swope v. Mitchell, 324 So. 2d 461 (La. App., 1975) (dividing military retirement pay).

[8] The highest courts of Colorado and Arkansas refused to permit the division of military retirement pay in divorce actions. Ellis v. Ellis, 191 Colo. 317, 552 P.2d 506 (1976); Fenney v. Fenney, 259 Ark. 858, 537 S.W. 2d 367 (1976). But other state courts reached opposite results prior to Hisquierdo. Fithian v. Fithian, 10 Cal. 3d 592, 111 Cal. Rptr. 369, 517 P.2d 449 cert. denied, 419 U.S. 825, (1974); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W. 2d 155 (1978), cert. denied, 442 U.S. 940 (1979); Kruger v. Kruger, 73 N.J. 464, 375 A.2d 659 (1977); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969); Busby v. Busby, 457 S.W. 2d 551 (Texas 1970); Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975). See also Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978) (applying Canal Zone law).

This split among the states is particularly important because of the frequency with which military personnel are transferred. The split encourages forum shopping since the military spouse's retirement benefits are secure in some states but not in others. The states have reached conflicting conclusions on an important question of federal law. There is a strong federal interest in the uniform interpretation of the Acts of Congress dealing with federal military retirement pay.

2. THE QUESTION IS IMPORTANT.

The question whether state law permits the division of military retirement benefits is important. It has never before been treated by this Court. In Hisquierdo, the Court considered policy reasons which might extend to military retirement pay but in its decision dealt only with benefits under the Railroad Retirement Act.

The United States now maintains an all volunteer army. One major inducement for enlistment and reenlistment is army retirement pay. It is no small matter for army recruiters to persuade enlisted men with many years' service to continue in the army, when such servicemen may lose much of their retirement pay in the event of divorce in those states which do not apply Hisquierdo to military retirement benefits.[9/]

[9/] The matter is made worse by federal law restrictions which reduce retirement pay if the military retiree takes on a federal civilian job:

> "5 U.S.C. § 5532(b): A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retirement pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retirement pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retirement pay under this subsection, the amount of $2,000 shall be increased, from time to time, by appropriate percentage, in direct proportion to each increase in retired or retirement pay under section 1401a(b) of Title 10 to reflect changes in the Consumer Price Index."

After subtracting from his already-reduced retirement pay that portion allocated to his ex-spouse under community property systems, the retired serviceman would be left with very little indeed.

Servicemen may well refuse to be transferred to community property states that apportion military retirement pay; by contrast, the army may find that many long term enlistees favor being transferred to Alaska and Texas, where military retirement benefits are protected.

The ex-serviceman's retired pay may represent the largest single asset of the marriage. For this reason the issue may assume paramount importance in many military divorces and unduly influence decisions concerning divorce, continued army life, voluntary transfer from post to post, and divorce settlement negotiations.

The serviceman may alter his decisions to participate in congressionally funded annuity programs to benefit the spouse and children if he believes that military retirement pay is not protected against division in the event of divorce. The Congress

has established several annuity programs, financed by voluntary deductions from the serviceman's pay, by which the serviceman may gain added benefits at the time of his retirement. Among these are the Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431-46, and the Armed Forces Survivor Benefit Plan, 10 U.S.C.§§ 1447-55. The comprehensive scheme contemplated by the Congress by means of these enactments becomes confused and the serviceman cannot make an intelligent judgment if he is not certain as to how his basic retirement pay will fit in with the annuity program in light of the unsettled status of military retirement pay in the post-Hisquierdo era.

Because of the thousands of divorces that will continue to be affected annually, the issue is of substantial importance and warrants plenary consideration by this Court.

3. THE APPEAL PRESENTS IMPORTANT QUESTIONS CONCERNING THE PREEMPTION BY FEDERAL INTERESTS OF STATE LAW CONCERNS IN THE AREA OF DIVORCE LAW.

The apportionment between spouses of military retirement benefits presents important issues of federal preemption of state divorce laws. Although divorce law is an area almost entirely regulated by the states, the distribution of federal remuneration is an area in which the federal government and the Congress have important concerns. Hisquierdo, 439 U.S. at 582. The established rule is that state law will not be preempted unless Congress has "positively required by direct enactment" that state law be preempted. 439 U.S. at 581. However, in the four instances in which this Court has considered federal preemption of state community property law the Court has in each

case found federal preemption. 10/

The Congress, when it has dealt expressly with community property claims of a divorced spouse, has generally been hostile to those claims. The 1977 clarification to the Social Security Act, Pub. L. No. 95-30, 91 Stat. 159 (1977) (codified as 42 U.S.C. § 662(c)), made it clear that in a divorce proceeding the divorced spouse could not claim as a creditor under community property principles; this provision clarified the meaning and intention of the 1975 amendment,

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10/ See Hisquerdo v.Hisquierdo, supra; Wissner v. Wissner 338 U.S. 655 (1950); Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962). See also McCune v. Essig, 199 U.S. 382 (1905).

A literal reading of 10 U.S.C. § 3929 together with § 3991 indicates that the Congress expressly mandated that army retirement pay is to be computed and paid to the servicemen exclusively pursuant to federal law. An examination of the congressional policies behind the literal meaning of these sections may reveal congressional preemption of state community property laws which divert the serviceman's pay to another recipient.

Pub. L. No. 93-647, 88 Stat. 2357 (1975) (codified at 42 U.S.C. § 659(a)). See Hisquierdo, 439 U.S. at 576-77. Under both the Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431-46, and the Armed Forces Survivor Benefit Plan, 10 U.S.C. §§ 1447-55, the Congress has excluded the claims of divorced spouses under state community property law.[11/] And in the anti-

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[11/] The serviceman's annuity under the Retired Serviceman's Family Protection Plan can benefit only a surviving spouse. At 10 U.S.C. § 1434(c) the Congress has specified that:

> "An election of an annuity . . . shall provide that no deduction may be made from the elector's retired or retainer pay after the last day of the month in which there is no eligible spouse because of death or divorce" [emphasis supplied].

In commenting upon this 1968 change in the legislation, the Department of Defense noted that "One purpose of the amendment was to safeguard the participant's future retire pay when . . . a divorce occurs . . ." 1968 U.S. Code Cong. and Adm. News

assignment and anti-anticipation provision relating to army retirement pay, 37 U.S.C. § 701, the Congress has foreclosed any argument that the divorced spouse may claim a por-

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3307. Further, the determination by Congress to exclude ex-wives was done with the most deliberate care. In the passage of the law setting up this plan, provisions which would have protected ex-wives were stricken from the law before its passage. 118 Cong. Rec. S. 29810-12 (1972). In this respect Congress purposely excluded ex-wives from benefiting under the plan. Cose v. Cose, 582 P.2d 1230, 1232 (1979).

Under the Armed Forces Survivor Benefit Plan the term "widow" is so defined in the Act at § 1447 (3) to make clear that the Congress deliberately sought to exclude ex-spouses as a beneficiary entitled to participate in the annuity purchased by a retired member of the armed forces.

tion of retirement pay.[12/]

The Hisquierdo court might well have pointed to the status of a community property spouse under the new Federal Bankruptcy

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12/ § 701(c) states as follows:

"An enlisted member of the Army . . . may not assign his pay, and if he does so, the assignment is void."

(a) of § 701 states as follows:

"Under regulations prescribed by the Secretary of the Army . . . a commissioned officer of the Army . . . may transfer or assign his pay account, when due and payable."

The phrase "when due and payable" in § 701(c) is the exact counterpart of the trust analogy in the Hisquierdo decision whereby the Supreme Court construed the phrase "shall not be anticipated" in § 231 (m) of the Railroad Retirement Act to mean that "the interest of a . . . beneficiary shall not be paid . . . before a certain date." 439 U.S. at 588. The court continued to say "if that definition is applied here, then the offsetting award respondent seeks would improperly anticipate payment by allowing her to receive her interest before the date Congress has set for any interest to accrue." 439 U.S. at 589. This analogy to the law of trusts is especially apt with reference to the phrase "when due and payable".

There is in fact little or no difference between paragraph (c) and paragraph (a) of § 701. Cf. United States v. Smith, 393 F.2d 318, 321 (5th Cir. 1968).

Act, 11 U.S.C. § 101 et seq., which entered into force only on October 1, 1979. There can be little doubt that a claim in bankruptcy under § 523(a)(5) of the new Act, "Exceptions to Discharges", by a spouse for community property assets, places the claim in the same category as other claims and makes the claiming spouse an ordinary creditor. The new bankruptcy law does not treat the community property spouse as a co-owner.

These numerous enactments do not manifest a federal policy of recognizing the claims of a non-military ex-spouse to military retirement pay. Rather these statutes suggest precisely the opposite: that military retirement pay is not divisible upon divorce.

4. THE COURT BELOW ERRED BY DIVIDING THE HUSBAND'S RETIREMENT PAY.

The Court of Appeal followed Fithian v. Fithian, 10 Cal. 3d 592, 111 Cal. Rptr. 369,

517 P.2d 449, cert. denied, 419 U.S. 829 (1974), a pre-Hisquierdo decision of the Supreme Court, and found nothing in Hisquierdo to change its mind. Relying upon a post-Hisquierdo decision of the Court of Appeal, Gorman v. Gorman 90 Cal.App. 3d 454, 153 Cal. Rptr. 479 (1979), the court concluded that nothing in the Railroad Retirement Act of 1974 so resembled the federal scheme of military retirement pay as to command the application of Hisquierdo to army retirement benefits.

In addition to the similarity between the anti-assignment provision of the Railroad Retirement Act, 45 U.S.C. § 231(m) and the anti-assignment provision governing military retirement pay, 37 U.S.C. § 701, essential features of military retirement pay parallel those deemed significant for retired railroad workers.

There is nothing unique in the struc-

ture of the railroad retirement system which makes it appropriate to limit Hisquierdo to railroad retirement benefits and not to extend its rationale to military retirement benefits. In neither case is the statutory scheme for retirement contractual; Congress is free to alter or even eliminate the retirement benefits. In both cases the benefits are correlated to the social security system. The 1975 and 1977 amendments to the Social Security Act, codified as 42 U.S.C. §§ 659(a) and 662(c), modify both § 231(m) of the Railroad Retirement Act and the anti-assignment provisions in the military retirement pay scheme, including 37 U.S.C. § 701.

Indeed, whereas the railroad retiree makes some contribution to his retirement program, the military retiree makes none; military retirement pay is funded entirely by mandatory tax receipts, and in that re-

gard the military retirement program is all of a piece with the social welfare plan designed by Congress. It defies logic to perceive in these funding sources a basis for refusing to apply Hisquierdo to military retirement pay.

Further, in a private contractual system for retirement pay, it is understood that retirement pay is, at least in part, payment for past services rather than either a gratuity or payment for ongoing services after retirement. By contrast, military retirement pay contains special features unlike any private retirement scheme.[13/]

13/ A member of the military receiving retirement pay remains subject to being recalled into active service. 10 U.S.C. § 672(a)(1). In this regard military retirement pay represents, at least in part, compensation for remaining in a call up status. Further, a member of the military receiving retirement pay remains subject to the code of military justice. 10 U.S.C. § 802. In this regard as well, the retiree has not broken his relationship with his employer. Further, the military retiree may not take on employment with civilian agency of the United States without substantial financial detriment. See 5 U.S.C. § 5532(b).

Finally, Congress has expressed itself as fully in the military retirement pay area as it has in the Railroad Retirement Act context in rejecting the preservation of benefits for a divorced spouse. See 42 U.S.C. §§ 659(a), 662(c); 10 U.S.C. §§ 1434 (c), 1447(3).

Cases which have applied Hisquierdo to military retirement pay correctly perceive that by its analysis and reasoning Hisquierdo bars the division of military retirement pay pursuant to a divorce. Cose v. Cose, 592 P.2d 123 (Alaska 1979); Ex parte Johnson 591 S.W. 2d 453 (1979); Perez v. Perez, 587 S.W. 2d 671 (Tex. App. 1979).

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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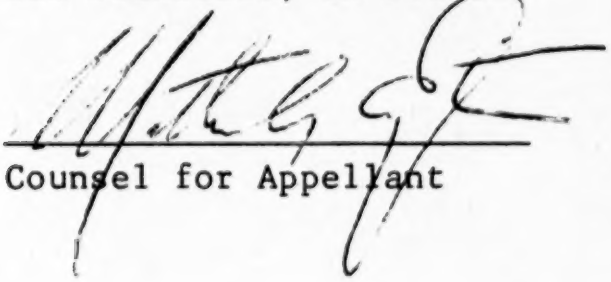

Counsel for Appellant

June 30, 1980

A copy of this Jurisdictional Statement shall be served upon the Attorney General of California, as 28 U.S.C. § 2403(b) may apply to this appeal.

APPENDIX A

[The Court's discussion of Hisquierdo v. Hisquierdo and the federal preemption issue appears on pages 57 - 59 of this appendix.]

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT,

DIVISION FOUR

In re the Marriage of Richard John and Patricia Ann McCarty.	
RICHARD JOHN McCARTY, Plaintiff and Appellant, v. PATRICIA ANN McCARTY, Defendant and Appellant.	1 Civil 45056 (Super. Ct. No. 715268)

Richard John McCarty (hereinafter "Husband") commenced this proceeding for dissolution of his marriage to Patricia Ann McCarty ("Wife"). He appeals from a portion

of an interlocutory judgment of dissolution in which Wife is awarded part of his monthly military retirement pension. Shortly after he filed notice of his appeal, he obtained from the trial court a final judgment of dissolution which made no exception for the portion of the interlocutory judgment from which he had appealed. Almost one year later, he obtained from the trial court an order amending the final judgment, nunc pro tunc, to except that portion of the interlocutory judgment from it. Wife appeals from that order. The two appeals have been consolidated.

PROCEDURAL SEQUENCE AND FACTS

Husband commenced the proceeding by filing a petition for dissolution of marriage on December 1, 1976. He alleged in the petition that the parties had separated on October 31, 1976, that there were three

minor children of the marriage, and that Husband was "domiciled in Oregon." Husband requested that all listed assets, including "all military retirement benefits," be classified as his separate property.

In her response to the petition, Wife alleged that Husband had "no separate property," and listed his retirement benefits as "subject to disposition by the court."

In answers to interrogatories, Husband stated that he was employed as a military physician at Letterman Army Hospital in San Francisco, that his current residence address was in San Francisco, and that he had resided at that address for two and one-half years. However, his request that the court classify all property acquired during the marriage as his separate property was supported by a declaration in which he alleged that he has always regarded himself as "being domiciled in Oregon."

Husband testified at trial that he had last voted in Oregon in 1968, that he had established and maintained a residence in Oregon in 1956, that he became an Oregon resident for the purposes of his tuition at an Oregon medical school, and that he had never considered himself as domiciled in California. Wife testified that she and Husband came to live in California in 1974, that she considered herself a California resident, and that she and Husband had not lived in Oregon since 1959.

On May 20, 1977, the trial court filed a memorandum decision in which it stated ". . . [Husband] . . . having failed to sustain the burden of proving that he was a resident of the State of Oregon at all times during his military service, the Court finds that his military pension or retirement rights with the U.S. Army are to be divided as quasi-community property pursuant to

section 4803 of the Civil Code . . . ."

Findings of fact and conclusions of law were filed on November 23, 1977. In finding no. 11, the court reiterated that Husband failed to sustain his burden of proof as to Oregon residency, while stating in finding no. 13 that ". . . [Wife] . . . was a resident of this State for more than six (6) months and of this County for more than three (3) months immediately preceding the filing of a petition in this action." In finding no. 14, the court found that Husband had "accrued certain pension and retirement benefits by virtue of his service in the United States Army during the marriage . . . . ," that these rights "are subject to the quasi-community property laws of this State," and that Wife "is entitled to and does have a quasi-community interest" in the military retirement funds. The court further determined that the funds would be divided according to a formula based upon

the ratio between the length of Husband's military service during the marriage and the total length of his military service prior to retirement. (See In re Marriage of Anderson (1976) 64 Cal.App.3d 36, 40; In re Marriage of Judd (1977) 68 Cal.App.3d 515, 522-523.)

An interlocutory judgment of dissolution was entered on November 30, 1977, ordering Husband to pay Wife "as long as she lives" that portion of his monthly retirement payment representing one-half of the community interest calculated according to the formula described above. On January 27, 1978, Husband filed a notice of appeal from that portion of the interlocutory judgment "awarding. . . [Wife] . . . a portion of his monthly pension or retirement payment from the United States Army."

On February 23, 1978, Husband filed in the trial court a request that final judgment of dissolution be entered. He alleged

in this request, among other thing, that "no appeal has been taken or is pending. . . [from the interlocutory judgment] . . . , and said judgment has become final." On the same day, the court entered a final judgment of dissolution of marriage ordering "that all of the provisions of the interlocutory judgment. . . be made binding the same as if set forth in full. . . ."

In her reply brief filed in this court on December 19, 1978, Wife contended that Husband had waived his right to appeal by requesting and obtaining a final judgment. This prompted Husband to move the trial court, on January 8, 1979, "to set aside and vacate judgment." Wife opposed the motion. On January 25, 1979, the trial court granted the motion and made an order amending the final judgment so as to except from it that portion of the interlocutory judgment which awards which awards Wife a portion of

Husband's military pension. Wife thereupon appealed from this order. The two appeals were subsequently ordered consolidated by this court for purposes of argument and decision.

REVIEW

Wife's Appeal

Wife continues to contend that Husband's request for a final judgment in this case constituted a waiver of his right to appeal and that this court should dismiss his appeal for that reason. Husband responds (1) that the trial court's order amending the final judgment nunc pro tunc so as not to include disposition of Husband's military retirement benefits cured the "technical deficiency" of which Wife complains; (2) that the trial court in any event had no jurisdiction to enter final judgment as to a matter pending on appeal; (3) that Wife waived her present contention by not moving to dismiss his appeal earlier; and (4) that

his alleged waiver of his right to appeal was not clearly and unmistakably shown. Wife, in turn, (A) challenges the validity of the trial court's order amending the final judgment nunc pro tunc, from which she has appealed; (B) answers Husband's jurisdictional argument by claiming that a party who has himself caused the court to act in excess of its jurisdiction may not thereafter complain of it; and (C) asserts that the issue of nonappealability may be raised at any time.

We need not discuss the merits of each of these points, individually, because of two dispositive conclusions: (1) Husband's act in obtaining the final judgment of dissolution, without specifying an exception for that portion of the interlocutory judgment under appeal, did not of itself constitute a waiver of his appellate rights, and (2) the trial court's order amending the previously entered final judgment of dissolution was valid.

Wife justifiably argues that a judgment entered by consent is not applicable. (See 6 Witkin, California Procedure (2d ed. 1971) Appeal, § 122, p. 4119.) However, Husband is not appealing from the final judgment to which he arguably consented; his appeal is from the portion of the interlocutory judgment which awarded Wife an interest in his retirement benefits. We must therefore decide whether Husband's act in obtaining the initial final judgment, which omitted any reference to his pending appeal from a portion of the interlocutory judgment, constituted a waiver of his right to pursue that appeal. Such waiver is ordinarily implied where a party accepts the benefits of a judgment in whole or in part and then seeks to attack it on appeal. (Turner v. Markham (1907) 152 Cal. 246, 247; 6 Witkin, Procedure, op. cit. supra, Appeal, § 136, p. 4131.) No claim is made that Husband has

sought to accept the portion of the judgment dividing his military retirement payments. Moreover, since Husband did not dismiss or abandon the appeal, his request for an unqualified final judgment created an ambiguity regarding Husband's intent. In the absence of unequivocal acquiescence or voluntary acceptance of benefits, it cannot be said that Husband waived his right to appeal from the designated portion of the interlocutory judgment. (Gudelj v. Gudelj (1953) 41 Cal.2d 202, 214.)

Notwithstanding his action in requesting final judgment, Husband's right to appeal from the interlocutory judgment would still be open to question in view of the subsequent entry of the final judgment, incorporating all provisions of the interlocutory judgment, unless the trial court's order amending the final judgment nunc pro tunc is valid. A court of general jurisdiction has the power, after final judgment

and regardless of lapse of time, to correct clerical errors or misprisions in its records, whether made by the court clerk or counsel, so as to make them reflect or speak the truth. (Benway v. Benway (1945) 69 Cal.App.2d 574, 579-580; 4 Witkin, Procedure, op. cit. supra, Judgment, § 66, p. 3228. See also Code Civ. Proc., § 473.) "Where the judgment as signed does not express the actual judicial intention of the court, but is contrary thereto, the signing of such a purported judgment is a clerical error rather than a judicial one." (Zisk v. City of Roseville (1976) 56 Cal.App.3d 41, 47; See Bastajian v. Brown (1941) 19 Cal.2d 209, 214.) The inadvertence or mistake of an attorney draftsman may constitute clerical error. (Russell v. Superior Court (1967) 252 Cal.App.2d 1, 6; 4 Witkin, op. cit. supra, § 69, p. 3231.) The trial court's determination whether an error is clerical

or judicial is entitled to great weight. (Hansen v. Hansen (1949) 93 Cal.App.2d 568, 570.)

Husband's attorney prepared a final judgment, for signature by the trial judge, which did not mention or except that portion of the interlocutory judgment which was then pending on appeal. Because Husband had never indicated any intention to abandon or dismiss his appeal, the trial court could reasonably have concluded the omission was an inadvertent act on the part of counsel. Furthermore, as Husband informed the court in his motion to vacate, the appeal from that portion of the interlocutory judgment dividing pension benefits automatically stayed all proceedings in the trial court on that subject and any attempt by the court to affect it would be void. (Code Civ. Proc., § 916, subd. (a); In re Lukasik (1951) 108 Cal.App.2d 438, 443-444.) The court could therefore have determined that it had not

intended to sign an order which was in direct contravention of statute and in excess of its jurisdiction.[1/]

Wife's arguments that Husband's motion to vacate was untimely under Code of Civil Procedure section 663, and that the trial court could not modify the final judgment because it was "an issue on appeal," are misplaced. Under Code of Civil Procedure section 473, a trial court has inherent power, at any time, to annul judgments inadvertently or improvidently made. (Zisk v. City of Roseville, supra, 56 Cal.App.3d 41 at p. 47; In re Marriage of Mercado (1977) 75 Cal.App.3d 701, 704.) There is substantial

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[1/] On May 24, 1979, the trial judge actually filed a declaration in which he stated that the error was due to inadvertence on the part of his clerk in approving the final judgment for signature, and that he (the judge) would not have signed it in the form prepared if it had been called to his attention that an appeal was pending. Although this declaration has not been included in the record on appeal, it is obviously pertinent to the present discussion. We therefore take judicial notice of it and its contents. (Evid. Code, § 452, subd. (d); id., § 459, subd. (a).)

evidence that the original final judgment was not the result of an exercise of judgment, but that its entry was due to inadvertence. (See In re Marriage of Mercado, supra, at pp. 704-705.) The order amending it nunc pro tunc, for the purpose of conforming it to the court's true intention, was therefore valid and must be affirmed. Husband's appeal is properly before this court.

Husband's Appeal

Husband contends on his appeal that the trial court's failure to make any findings relating to "domicile" is fatal to the judgment because the court had no jurisdiction to treat his military pension as quasi-community property unless it first found that both parties were domiciled in California.

Section 4800 of the Civil Code[2/] provides for an equal division of both community and quasi-community property. Section 4803 defines "quasi-community property" in this way: "As used in this part, 'quasi-community property' means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways: [¶] (a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition. [¶] (b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition."

[2/] Statutory references after this point are to the Civil Code except where expressly indicated otherwise.

In Addison v. Addison (1965) 62 Cal.2d 558, the Supreme Court held that section 4803 (then section 140.5) was constitutional but interpreted it to require that husband and wife be "domiciled in California" at the time of dissolution: "The legislation under discussion, unlike old section 164, makes no attempt to alter property rights merely upon crossing the boundary into California. It does not purport to disturb vested rights 'of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him. . .' (Citation.) Instead, the concept of quasi-community property is applicable only if a divorce or separate maintenance action is filed here after the parties have become domiciled in California. Thus, the concept is applicable only if, after acquisition of domicile in this state, certain acts or events occur which give rise to an action for

divorce or separate maintenance. These acts or events are not necessarily connected with a change of domicile at all." (Id., at p. 566 [emphasis added].)

The requirement of domicile was clearly crucial to the holding in Addison, because the court rejected a due process attack on the quasi-community property statute by citing "the [substantial] interest of the state of the current domicile in the matrimonial property of the parties" upon dissolution of the marital relationship. (62 Cal.2d at p. 567 [emphasis added].) Moreover, this court recently held that the Addison court's constitutional sanction of quasi-community property principles was limited to cases meeting "two prerequisite conditions: (1) both parties have changed their domicile to California, and (2) subsequent to the change of domicile the spouse sought in a California court legal alteration of their marital status." (In re the

Marriage of Roesch (1978) 83 Cal.App.3d 96, 107.)

The trial court did not make a finding as to the domicile of either party, although it did find that Wife was a "resident" of California and of San Francisco for the jurisdictional periods required by section 4530.[3/] The omission did not constitute reversible error for the reasons next captioned and discussed.

(1) Husband is estopped from asserting a foreign domicile. He makes no claim

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3/ Section 4530 provides that a judgment of dissolution may not be entered unless one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceeding is filed for three months. . ." (Emphasis added.) Residence and domicile are not interchangeable in California as Wife suggests. As the Supreme Court noted in Smith v. Smith (1955) 45 Cal.2d 235, residence connotes "any factual place of abode of some permanency," while domicile "is the more comprehensive term, in that it includes both the act or residence and intention to remain." (Id., at p. 239 [original emphasis]. See also § 4531.)

that Wife was domiciled anywhere other than California, and indeed could not do so, because a court has no jurisdiction to grant a dissolution where neither party is domiciled within the state. (6 Witkin, Summary of California Law (8th ed. 1974) Husband and Wife, § 71, p. 4943.) By filing this action for dissolution in a California court while claiming a foreign domicile, Husband impliedly alleged that Wife's domicile was within this state. Under the principle of "divisible divorce," the domicile of one spouse is sufficient to grant a dissolution (Williams v. North Carolina (1945) 325 U.S. 226, 229-230), while support and property rights can only be adjudicated by a court having in personam jurisdiction over both parties. (Estin v. Estin (1948) 334 U.S. 541, 548-549; Hudson v. Hudson (1959) 52 Cal.2d 735, 642-745; 6 Witkin, Summary, op. cit. supra, Husband and Wife, § 77 p. 4949.)

Husband unquestionably invested the California court with such in personam jurisdiction by petitioning that court for dissolution. He went further in that direction by requesting a full disposition of all property and child custody rights arising from the marriage. Having thus invoked the jurisdiction of California over both his marital status and his property rights, he cannot now be heard to contend that a California court is foreclosed from dividing property acquired during the marriage, in accordance with the law of this state, on the ground that his domicile is somewhere else. (See Maloney v. Maloney (1944) 67 Cal.App.2d 278, 280; Mikulski v. Mikulski (1969) 2 Cal.App.3d 1047, 1050; 1 Witkin, Procedure, op. cit. supra, Jurisdiction, §§ 12 [p. 537], 98 [p. 623].) "[T]he plaintiff, by bringing the action, submits himself to the jurisdiction of the court with respect to

his cause of action. Hence, even though he is not present or domiciled in the state, the judgment in his action is binding on him." (1 Witkin, loc. cit., p. 623 [emphasis added].)

Because California is the only state which has in personam jurisdiction over both the parties and their assets, and because Husband's pension benefits were acquired during the marriage, California may make a binding determination of those property rights regardless of where he is domiciled. (See Waite v. Waite (1972) 6 Cal.3d 461, 467-469.) Because he has invoked the jurisdiction of California over his personal property, he is estopped from denying the authority of its courts to adjudicate them in accordance with California law. ". . . California public policy will not permit a litigant 'to blow hot and cold.' He cannot take the benefits of a divorce decree when it

suits his purpose and then reverse his position and repudiate the divorce decree on the ground that it is void for want of jurisdiction (even though it may be) when it is no longer profitable or to his advantage to do so." (In re Marriage of Toth (1974) 38 Cal.App.3d 205, 212.)

(2) A finding that Husband was domiciled in California may be inferred. Husband maintained throughout the dissolution proceeding that he was domiciled in Oregon. Uncontradicted evidence nevertheless established that he left Oregon in 1959; that, after graduating from medical school there, he went on active duty with the United States Army for one year in Pennsylvania, three years in Hawaii, two years in Washington, D.C., four years in California, and five years in Texas; that, after his Texas assignment, he lived in California for two and a half years and resided in this state at the

time he commenced the present proceeding; and that he had not filed any state income tax returns in Oregon within the last preceding five years.

The record does not show that Husband objected to the court's findings, or requested special findings or proposed counterfindings, or brought to the attention of the court any "omission, ambiguity, or conflict" in the findings proposed. (Code Civ. Proc., § 634.) Under such circumstances, this court may infer any findings and conclusions favorable to Wife and in support of the judgment. (In re Marriage of Dawley (1976) 17 Cal.3d 342, 354; Rees v. Department of Real Estate (1977) 76 Cal.App.3d 286, 291.) From the trial court's findings that Husband failed to prove residency in Oregon, that Wife was a resident of California, that Husband's military pension was subject to California's quasi-community

property laws, and that Wife "is entitled to and does have a quasi-community interest in such military pension. . . ," we therefore infer a finding that both parties were domiciled in California at the time the dissolution was filed. (Addison v. Addison, supra, 62 Cal.2d 558 at p. 566.)

It also appears, from the uncontradicted evidence noted above, that any finding regarding domicile would necessarily have been adverse to Husband. Any error in failing to make specific findings as to domicile was accordingly not prejudicial. (McCullough v. Jones (1970) 11 Cal.App.3d 270, 275.)

Finally, the clerk's transcript shows that the findings of fact and conclusions of law were prepared by counsel for Husband.[4/]

[4/] Both the proposed findings and the actual findings display the caption of Husband's attorneys. Moreover, the only objection to any findings was filed by Wife's counsel, stating that ". . . [Wife] . . . objects to the findings of fact and conclusions of law heretofore submitted by petitioner [Husband] . . . ." (Emphasis added.)

An appellant may not complain of inadequate or erroneous findings prepared by his own attorney. (Johnson v. Rich (1957) 150 Cal. App.2d 740, 747; Tucker v. Cave Springs Min. Corp. (1934) 139 Cal.App. 213, 218.)

For all of the foregoing reasons, the failure to make findings regarding domicile did not constitute prejudicial error.

Husband also contends that the federal scheme of military retirement benefits pre-empts all state community property laws with respect thereto, and that California courts are accordingly precluded by the Supremacy Clause from dividing such benefits as the interlocutory judgment orders.

This precise contention was rejected by the California Supreme Court in 1974. (In re Marriage of Fithian (1974) 10 Cal.3d 592, 597-604, cert. den. 419 U.S. 825.) The court found "no evidence that the application of California community property law interferes in any way with the administration or

goals of the federal military retirement pay system," and held that "military retirement pay properly can be characterized as community property in accordance with established principles of California law." (Id., at p. 604.)

More recently, the United States Supreme Court overturned a post-Fithian decision in which the California Supreme Court had held that benefits payable under the federal Railroad Retirement Act could similarly be characterized as community property under California law. (Hisquierdo v. Hisquierdo (1979) _____ U.S. _____ [99 S.Ct. 802].) Husband essentially argues that Hisquierdo overruled Fithian as controlling authority relative to military retirement benefits. This precise contention has also been rejected by a California Court of Appeal. (Gorman v. Gorman (1979) 90 Cal. App.3d 454, 460-462 [hearing den. May 10, 1979].)

After analyzing the contention and the pertinent federal enactments, the Gorman court stated: "We conclude that Hisquierdo does not control the determination as to whether military retirement benefits constitute community property divisible upon dissolution, and pending further consideration of the issue by the California Supreme Court, its decision in Fithian constitutes precedent we are bound to follow." (Gorman v. Gorman, supra, 90 Cal.App.3d 454 at p. 462.) We agree with this conclusion and the reasoning by which the Gorman court reached it. (See id., at pp. 460-462.) Husband's contention to the contrary is accordingly rejected on the authority of Fithian. (In re Marriage of Fithian, supra, 10 Cal.3d 592 at pp. 597-604.)

The order from which Patricia Ann McCarty appeals is affirmed. Neither party shall recover costs on her appeal. The portion of the interlocutory judgment of dissolution from which Richard John McCarty appeals is affirmed. Patricia Ann McCarty shall recover her costs on his appeal.

RATTIGAN, ACTING PRESIDING JUDGE

We concur:

CHRISTIAN, J.

POCHE, J.

1 Civil 45056

APPENDIX B

Document 1: Memorandum of Intended Decision (entered May 20, 1977)

CALIFORNIA SUPREME COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER THIRTEEN

In re the Marriage of Petitioner: RICHARD JOHN McCARTY, and Respondent: PATRICIA ANN McCARTY.	No. 715 268 MEMORANDUM OF INTENDED DECISION

At the time of the trial on April 11, 1977, a decision was announced in open court in all matters excepting a determination of property rights as provided by law and respondent's request for attorney's fees and costs.

The petitioner, having failed to sustain the burden of proving that he was a resident of the State of Oregon at all times

during his military service, the Court finds that his military pension or retirement rights with the U.S. Army are to be divided as quasi-community property pursuant to section 4803 of the Civil Code, and respondent's community property interest in any funds received therefrom, will be divided in accordance with the formula set forth in the case of In re Anderson 64 Cal. App. 3d 38. Pursuant to this decision, petitioner shall pay to respondent, as long as she lives, that portion of his total monthly pension or retirement payment which equals one-half of the ratio of the total time between marriage and separation during which petitioner was in the U.S. Army to the total number of years he has served with the Army at the time of retirement, and the Court retains jurisdiction to make such a determination at that time and to supervise distribution.

The furniture and furnishings of the parties', pursuant to stipulation in open court, has been divided equally between them.

Respondent shall receive as her sole and separate property the Volkswagen with the value of $2,050, and her mother's obligation to the community in the amount of $2,000.

Petitioner shall receive as his sole and separate property the Van, valued at $5,875, cash in petitioner's possession after payment of obligations outstanding at the time of separation and the net amount of $201 and the life insurance policies with a cash value of $4,756. From this net community equity, petitioner shall pay attorney's fees to Walter T. Winter, attorney for the respondent as a community-type obligation, the sum of $2,000 and an additional $100 toward costs. From these same assets

received by petitioner, he shall also be entitled to payment or reimbursement for $2,000 toward his own attorney's fees and $100 towards his costs.

Respondent shall receive the California life insurance policy and assume all payments thereon, said policy having no cash value.

Pursuant to the foregoing, petitioner would be receiving net assets of a value of $6,632, and respondent net assets of a value of $4,050. To accomplish an equal distirbution, petitioner shall pay to respondent the sum of $1,291 to be payable within thirty (30) days.

The Court reserves jurisdicton over the issue of the responsibility for any 1976 income tax liabilities or refunds.

Respondent, in open court, having requested findings of fact and conclusions of law, petitioner shall also prepare a

judgment in accordance with the decision announced in open court and this Memorandum of Intended Decision.

DATED: May 19, 1977

DONALD B. KING

JUDGE OF THE SUPERIOR COURT

Document 2: Findings of Fact and Conclusions of Law (entered September 8, 1977)

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY

OF SAN FRANCISCO

In Re the Marriage of RICHARD JOHN McCARTY, Petitioner, PATRICIA ANN McCARTY, Respondent.	No. 715 268 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This proceeding for dissolution of marriage came on regularly for hearing before the above-entitled Court on April 11, 1977, Petitioner being represented by EDWARD B. COLLINS, his attorney and Respondent being represented by WALTER WINTER, her attorney. Evidence both oral and documentary was introduced, and the cause was submitted

for decision. Being fully advised in the matter, the Court makes the following findings of fact:

FINDINGS OF FACT

1. The parties were married on 23 March 1957 in Portland, Oregon, and have been married ever since.

2. The parties separated 31 October 1976 and the number of years from date of marriage to date of separation is nineteen (19) years, seven (7) months, and eight (8) days.

3. There are four (4) children of this marriage, including the following minor children:

Name	Birth Date	Sex
MARTIN RALPH McCARTY	Dec. 14, 1960	Male
MARLENE ALIKA McCARTY	Dec. 27, 1962	Female
MICHAEL WILDE McCARTY	Sept. 8, 1964	Male

4. Respondent is and has been a resident of this state for at least six (6) months and of the county for three (3) months immediately preceding the filing of the Petition herein.

5. Irreconcilable differences between the parties, which have caused an irremediable breakdown of the marriage, exist.

6. The best interests of the minor children of the parties require that their care, custody, and control be awarded to the Petitioner with reasonable visitation rights to the Respondent.

7. The Respondent is presently attending San Francisco State University part-time, majoring in psychology with a view toward obtaining a Ph.D. in psychology in five (5) or six (6) years.

8. The Respondent is capable of obtaining part-time employment while she is attending San Francisco State University.

9. The Respondent is entitled to utilize the commissary, officers' club, post exchange, and military medical facilities which offer either lower prices than are regularly available to civilian customers or, as in the case of medical care, are free until a final Decree of Dissolution is entered.

10. The Petitioner's net monthly income is $1,536.87. He receives military housing and other standard military benefits which do not include dental care for the children.

11. In addition to his obligation to support and educate the three (3) minor children, the petitioner is responsible for the college expenses of his eighteen (18)-year-old daughter, MAUREEN, and for financial aid to his infirm mother.

12. The Petitioner may receive a variable incentive pay bonus in September of 1977.

13. The Petitioner's fixed monthly expenses, before any allowance for spousal support, are currently in excess of his net monthly income. In order to pay spousal support, the Petitioner's expenses for maintaining himself and his children will have to be contracted--music lessons may cease, a housekeeper will have to be dismissed, etc.

14. In light of Petitioner's obligations and responsibilities, he is able to pay a maximum of $500.00 per month spousal support.

15. The furniture and furnishings of the parties have been divided equally between them by stipulation before the Court.

16. The following is the community property and debts of the parties subject to disposition by the Court in this proceeding:

A. PROPERTY:	VALUE
(1) Chevrolet Van	$ 5,875.00
(2) Cash value of life insurance policies	$ 3,280.00
(3) Cash (after payment of debts at time of separation)	201.00
(4) Volkswagen Car	2,050.00
(5) Debt owed by Margarite Iassac	2,000.00
Total	$13,406.00

B. DEBTS:	
Attorneys' fees and costs:	
(1) Walter Winter, Esq.	$ 2,000.00
For costs	100.00
(2) Edward Collins	2,000.00
For costs	100.00
Total	$ 4,200.00

Petitioner has paid $1,000.00 to Mr. Winter and $1,000.00 to Mr. Collins on account for the above attorneys' fees from the community funds.

17. Petitioner has failed to bear his burden of proof that he was a resident of the State of Oregon at all times during his military service.

18. The parties incurred a 1976 tax liability of $913.00, which was not covered by deductions from the Petitioner's salary.

CONCLUSIONS OF LAW

From the above facts, the Court concludes that:

1. The Petitioner is entitled to a judgment dissolving his marriage.

2. The Petitioner is entitled to the care, custody, and control of the minor children and the Respondent is entitled to reasonable visitation rights.

3. The Respondent is entitled to receive as spousal support the sum of $475.00 per month for her support and maintenance, such payments to have commenced on May 1, 1977 and to continue until a final decree of dissolution of the marriage is entered. Upon entry of a final decree of dissolution, the Respondent will be entitled to receive as spousal support the sum of $500.00 per month for her support and maintenance to commence on the first day of the month after final judgment of dissolution is entered. Furthermore, Respondent is to receive twenty percent (20%) of the gross amount of variable incentive pay bonuses received by Petitioner. Such support is to continue until her death or remarriage or further order of the Court, whichever occurs first.

4. The Respondent is to report to the Petitioner at the beginning of each month any income she receives from employment and

Petitioner is to be entitled to reduce the amount he pays in spousal support by $1.00 for every $3.00 she has earned during the preceding month.

5. The property subject to disposition of this Court shall be awarded as follows:

(a) To the Petitioner: the Chevrolet Van; the cash, after payment of obligations at the date of separation, of $201.00; and the cash value of the life insurance policies of $3,280.00.

(b) To the Respondent: the Volkswagen, and the obligation of Margarite Iassac of $2,000.00.

So that the division of property will be equal, the Petitioner shall first pay attorneys' fees of $1,000.00 to WALTER WINTER, ESQ., and an additional $100.00 for costs, and $1,000.00 to EDWARD B. COLLINS, ESQ., and additional $100.00 for

costs, in addition to the $1,000.00 that he has already paid to both MR. WINTER and MR. COLLINS. The Petitioner should then pay $553.00 to the Respondent.

6. The Court retains jurisdiction to allocate the parties' 1976 income tax liability.

7. The Petitioner, having failed to sustain the burden of proving that he was a resident of the State of Oregon at all times during his military service, the Court finds that his military pension or retirement rights with the U.S. Army are to be divided as quasi-community property pursuant to Section 4803 of the Civil Code, and Respondent's community property interest in any funds received therefrom, will be divided in accordance with the formula set forth in the case of In re Anderson, 64 Cal.App.3d 38. Pursuant to this decision, Petitioner shall pay to Respondent, as long as she lives, that

portion of his total monthly pension or retirement payment which equals one-half of the ratio of the total time between marriage and separation during which Petitioner was in the U.S. Army to the total number of years he has served with the Army at the time of retirement, and the Court retains jurisdiction to make such a determination at that time and to supervise distribution.

Let judgment be entered accordingly.

DATED: September 6, 1977

DONALD B. KING
JUDGE OF THE SUPERIOR COURT

Document 3: Interlocutory Judgment (entered November 30, 1977)

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN FRANCISCO

In re the marriage of Petitioner: RICHARD JOHN McCARTY, and Respondent: PATRICIA ANN McCARTY.	Case No. 715 268 INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

This proceeding was heard on April 11, 1977 before the Honorable Donald B. King Department No. 14.

The court acquired jurisdiction of the respondent on December 7, 1976 by:

[X] Service of process on that date, respondent not having appeared within the time permitted by law.

[ ] Service of process on that date and respondent having appeared.

[ ] Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jursidiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

The Court further orders that:

(1) The petitioner is to have custody of the minor children and the respondent is to have reasonable visitation rights.

(2) The petitioner is to pay the respondent the sum of $475 per month for her support and maintenance, such payments to have commenced on May 1, 1977 and to continue until a Final Decree of Dissolution is entered. Upon final entry of a Final Decree of the Dissolution the petitioner is to pay the respondent as spousal support the sum of $500 per month for support and maintenance to commence on the first day of the month

after final judgment of dissolution is entered. Furthermore, the petitioner is to pay respondent 20% of the gross amount of any variable incentive pay bonus he might receive. Such support is to continue until the repsondent's death or remarriage or further order of the Court whichever occurs first.

(3) The respondent is to report to the petitioner at the beginning of each month any increase in income she receives from employment and petitioner is entitled to reduce the amount he pays in spousal support by $1.00 for each $3.00 she has earned during the preceding months.

(4) The property subject to disposition of this Court shall be awarded as follows:

(a) To the petitioner: the Chevrolet Van; the cash, after payment of obligations at the date of separation, of $201.00; and the cash value of the life insurance policies of $3,280.00.

(b) To the respondent: The Volkswagen, and the obligation of Margarite Iassac of $2,000.00.

So that the division of the property will be equal, the petitioner shall first pay attorneys' fees of $1,000.00 to WALTER WINTER, ESQ., and an additional $100.00 for costs, and $1,000.00 to EDWARD B. COLLINS, ESQ., and an additional $100.00 for costs, in addition to the $1,000.00 that he has already paid to both MR. WINTER and MR. COLLINS. The petitioner should then pay $553.00 to the respondent.

(5) The Court retains jurisdiction to allocate the parties' 1976 income tax liability.

(6) The petitioner shall pay the respondent as long as she lives, that portion of his total monthly pension or retirement payment from the U.S. Army which equals one-half of the ratio of the total time between marriage and separation during which petitioner was in the U.S. Army for the total number of years he has served with the Army at the time of retirement, and the Court retains jurisdiction to make such a termination at that time and to supervise distribution.

Dated: November 21, 1977

JUDGE OF THE SUPERIOR
ROBERT D. CARTER
Approved as to form

Approved as to form:

EDWARD B. COLLINS
Attorney for Petitioner

Approved as to form:

WALTER T. WINTER
Attorney for Respondent

Document 4: Final Judgment (entered February 3, 1978)

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN FRANCISCO

In re the marriage of	)	Case No.
Petitioner: RICHARD JOHN McCARTY,	)	715 268
and	)	FINAL JUDGMENT
Respondent: PATRICIA ANN McCARTY.	)	(MARRIAGE) OF DISSOLUTION

The court acquired jurisdiction of the respondent on December 7, 1976 by:

[X] Service of process on that date, respondent not having appeared within the time permitted by law.

[ ] Service of process on that date and respondent having appeared.

[ ] Respondent on that date having appeared.

The court orders that:

[ ] Pursuant to [ ] Civil Code Section 4506(1) or [ ] Civil Code Section 4506(2), a Judgment of Legal Separation and such other orders as are set out below be entered.

/ / Pursuant to / / Civil Code Section 4400, / / Civil Code Section 4401, or / / Civil Code Section 4425( ), a Judgment of Nullity and such other orders as are set out below be entered, and that the parties be restored to the status of unmarried persons.

/X/ Pursuant to /X/ Civil Code Section 4506(1) or / / Civil Code Section 4506(2), a Final Judgment of Dissolution be entered, and that all of the provisions of the interlocutory judgment, which was entered on Nov. 30, 1977, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons.

Dated: February 23, 1978

DONALD B. KING
JUDGE OF THE SUPERIOR COURT

APPENDIX C

[The order of the California Supreme Court denying Appellant's petition for a hearing appears in the court's minutes for April 3, 1980. Those minutes are reprinted in the advance sheets of "California Official Reports", 1980, number 12, Minutes, at 1 (April 29, 1980). The minutes will not appear in the bound version, known as "California Reports" 3d.]

MINUTES

SUPREME COURT [OF CALIFORNIA]

Los Angeles, April 3, 1980

• • • • •

(1 Civ. 45056 Div. 4)--In re the Marriage of McCarty, McCarty v. McCarty. Appellant's petition for hearing denied. The request for an order directing publication of the opinion in the above entitled cause is denied.

APPENDIX D

MATTANIAH EYTAN
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San Francisco CA 94104
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Attorneys for Petitioner
and Appellant

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of RICHARD JOHN McCARTY, Petitioner and Appellant, vs. PATRICIA ANN McCARTY, Respondent.	CIVIL 1/ CIV. 45056

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that Richard John McCarty, the petitioner and appellant

named above, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, entered in this action on February 6, 1980, which affirmed the superior court's judgment dissolving the parties' marriage.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/MATTANIAH EYTAN

Counsel for Richard John McCarty

APPENDIX E

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code, Title 10:

§ 672. Reserve components generally

(a) In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty (other than for training) for the duration of the war or emergency and for six months thereafter. However--

> (1) a member on an inactive status list or in a retired status may not be ordered to active duty under this subsection unless the Secretary concerned, with the approval of the Secretary of Defense in the case of the Secretary

of a military department, determines that there are not enough qualified Reserves in an active status or in the inactive National Guard in the required category who are readily available. . . .

§ 3929. Computation of retired pay: law applicable

A member of the Army retired under this chapter is entitled to retired pay computed under chapter 371 of this title.

§ 3991. Computation of retired pay

The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or the table in section 1401 of this title, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title.

United States Code, Title 11:

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does

not discharge an individual debtor from any debt--

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that--

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

United States Code, Title 42:

§ 659. Enforcement of individual's legal obligations to provide child support or make alimony payments

(a) United States and District of Columbia to be subject to legal process

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia

(including any agency, subdivision, or instrumentality thereof) to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

§ 662. Definitions

For purposes of section 659 of this title--

(c) The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

California Civil Code

§ 4803. Quasi-community property

As used in this part, "quasi-community property" means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.